No. 356

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

JAMES W. ANDREWS, as Trustee in Bankruptcy of the Estate of FRANK SHANNON, Bankrupt,

PETITIONER,

against

THE METROPOLITAN JOCKEY CLUB and WALTER KEENAN and CENTRAL HANOVER BANK AND TRUST COMPANY, sole executors of the Estate of John G. Cavanagh, Deceased,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NASSAU, AND BRIEF IN SUPPORT THEREOF

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To THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

James W. Andrews, as Trustee in bankruptcy of Frank Shannon, Bankrupt, prays that a writ of certiorari issue to review the judgment on remittitur on the Order of the Court of Appeals of the State of New York, entered herein in the Supreme Court of the State of New York, County of Nassau, on the 13th day of May, 1942, which affirmed the judgment of the

said Supreme Court of the State of New York, County of Nassau, which dismissed petitioner's complaint (R. 45) in an action for money had and received to the use of the plaintiff's bankrupt (R. 7); and such order of the Court of Appeals (R., pp. b, c).

The said Court of Appeals entertained a motion for rehearing of the appeal and filed its order denying such motion on June 4, 1942 (R., p. d).

THE FACTS.

The facts are not in dispute.

The plaintiff is the trustee in bankruptcy of Frank Shannon, a race-track bookmaker who filed a voluntary petition in bankruptcy in the United States District Court for the Eastern District of New York after a judgment had been secured against him for the recovery of stolen moneys lost to him by the thief in bets on horse races at race tracks in New York State.

Bookmaking is prohibited by Article I, § 9 of the New York Constitution.

The respondent, Metropolitan Jockey Club, is the operator of a horse-race track at Jamaica, Long Island, New York, known as the Jamaica Track (R. 122, 126).

John G. Cavanagh was the agent of the Club to make the daily collections from bookmakers hereinafter described (R. 24, 124) and was originally sued jointly with the Club.

The defendant, Cavanagh, died after the suit had been brought, and the respondents, Walter Keenan and Central Hanover Bank & Trust Company, as the sole executors under his will, were substituted as parties defendant (R. 1).

In the years 1934, 1935, and 1936, Frank Shannon, while operating as a bookmaker at the said Jamaica Track, paid to the respondent Club *in cash* $100 a day for every day upon which six races were run there, and $110 a day on each day upon which seven races were run (R. 252).

He also paid in cash $25 a day for five tickets at $5 each for the admission of his clerks to the Club House betting ring at the track (R. 252). This was a higher charge than that for admission to other portions of the race track grounds (R. 125, 160). This state of facts formed the basis of a claim for recovery of these sums by the petitioner upon the ground that the Crawford Law (New York Laws, 1934, chap. 233) was unconstitutional in that it removed all criminal penalties for bookmaking at race tracks; but this question was not reached for decision because of the disposition by the court of the preliminary question of ownership of Shannon's winnings which raises the constitutional questions which are the subject of this petition.

It is conceded that during this period Shannon was insolvent (R. 176, 252). There was no evidence that he received any consideration for these payments (R. 139). The respondents claimed that these payments were "donations" to the respondent Club as contributions for stakes and purses (R. 252).

These gifts were made daily, one day in advance, for the races to be held the following day (R. 67). It was the practice at this track for the Club to refund to a bookmaker his "donation" if he was unable to operate at the track upon the day for which it was made (R. 124, 133, 135, 158).

Counsel for the respondent Club admitted upon the trial that his client knew that Shannon and other bookmakers who made like donations, were making book at its track in 1934, 1935, and 1936, and accepting bets and paying losses (R. 56); that these acts were illegal and that it made no effort to stop them. In 1935 and 1936 alone the Club collected $410,983 as such donations from the bookmakers at its track (R. 29, 30, 32).

The Trustee in bankruptcy brought suit for the benefit of creditors to recover these daily donations because they were obtained from Shannon (1) while he was insolvent and (2) through undue influence (R. 11).

Among the claims filed in the bankruptcy action was one by the Collector of Internal Revenue for $1,216.86 as unpaid Federal income taxes (R. 104); and one for $22,895.76, the amount of a judgment (mentioned, *supra,* p. 2), obtained by the Receiver in Supplementary Proceedings of one Toale for money stolen by him and lost to Shannon on horse-race bets (R. 22). (*Marett, Rec'r* v. *Shannon,* 164 Misc. 790—opinion printed Appendix A, *post,* p. 24).

The respondents, under a general denial (R. 8) claimed that the money sought to be recovered belonged to persons who advanced money to finance Shannon and at the trial offered in evidence—over petitioner's objection—a deposition of one McClanahan (R. 212), an ex-gambling-house keeper, to the effect that in April, 1936, he had advanced $30,000 to Shannon toward his "bankroll" or gambling capital (which totalled $35,000—[R. 153]) for Shannon's "book" to commence the 1936 season, under an oral agreement that all of Shannon's winnings were to become the property of McClanahan, his financier. Remittance was made by checks, payable to Shannon's order

(R. 168, 246, 247) and were endorsed and deposited in a joint account in the name of Shannon's wife and his cashier (R. 153).

Early in October, 1936, Shannon had refunded the $30,000 to McClanahan and continued to operate for the rest of the racing season which ended about three weeks later (R. 49, 50, 55). There was no evidence that the balance in the bankroll—which included daily winnings (R. 67, 73, 74, 153)—ever fell below $30,000 during the season. The alleged financiers for the 1934 and 1935 seasons did not testify.

The plaintiff objected to the introduction of all evidence of this alleged contract between McClanahan and Shannon (R. 212) upon the ground that, even if proved, it was illegal and, under the decision in the case of *Chapin* v. *Austin,* 165 Misc. 414 (opinion printed as Appendix B, *post,* p. 27) applying § 993 of the Penal Law, it was void and incompetent to rebut the presumption of law that the currency which Shannon paid over to the respondent Club belonged to Shannon because it was in his possession.

The petitioner's objection was overruled, the evidence was admitted and the complaint was dismissed by the Trial Court upon the ground that (R. 254):

> "It would be a miscarriage of justice to allow creditors of a bankrupt to recover money never owned by that bankrupt through a technical claim that evidence may not be presented to show that he did not own the money because he used it in connection with an illegal business, viz.: bookmaking. The claim of illegality should not be permitted as a cloak for injustice."

McClanahan had received back all the money he advanced to Shannon. The cash paid to the respondent

Club by Shannon represented his winnings or, in part, the other $5,000 he had in his bankroll. The admissibility of evidence offered in an attempt to prove that McClanahan owned any of the money presented the basic question of law upon the record. This question all the lower Courts have failed to discuss.

The nub of the law as to McClanahan's advance was not that Shannon *used* it in connection with bookmaking but that it was *advanced to him to use* in bookmaking (see § 993, Penal Law, quoted in brief in full, *post,* pp. 16, 17).

The petitioner in making his objection relied upon § 993 of the Penal Law of the State of New York which was applied in the case of *Chapin* v. *Austin, supra,* (Appendix B, *post*).

Neither appellate court filed any opinion herein.

Four other identical actions by this petitioner against four other racing associations are awaiting the disposition of this case.

QUESTIONS PRESENTED.

1. Whether the creditors of this bankrupt through the petitioner have been deprived of the protection of the law of the land in that the Courts have ignored and failed to apply § 993 of the Penal Law of the State of New York which provides:

> "*All things in action,* judgments, mortgages, conveyances, and every other security whatsoever, *given or executed,* by any person, where the whole or any part of the consideration of the same shall be for any money or other valuable thing won by playing at any game whatsoever, or won by betting on the hands or sides of such

> as do play at any game, or *where the same shall be made for the repaying* any money knowingly lent or *advanced* for the *purpose of such gaming or betting* aforesaid, or lent or advanced at the time and place of such play, to any person so gaming or betting aforesaid, or to any person who during such play, shall play or bet, *shall be utterly void,* * * *." (Italics ours.) (The remainder of the statute is quoted *post,* p. 16.)

and thereby discriminated unjustifiably in favor of those engaged in violating the gambling laws of the State and against the petitioner in violation of the rights of the bankrupt's creditors and of the petitioner under the Fourteenth Amendment to the Federal Constitution.

2. Whether evidence of a void (e. g., gambling) contract is admissible—except by statute—to rebut the legal presumption that the possessor of currency is the owner thereof.

3. Whether a court may give legal effect to a void contract, e. g.: whereby the winnings of a common gambler would become the property of one who has supplied some funds for his gambling enterprise.

4. Whether the rights of legitimate business should not prevail over the interests of an organized gambling industry when they clash in the courts of a State whose constitution, laws, decisions, and public policy are all directed to the suppression of common gambling. (*Watts* v. *Malatesta,* 262 N. Y. 80; *Bamman* v. *Erickson,* 288 N. Y. 133.)

PROCEEDINGS IN THE STATE COURTS.

The petitioner as Trustee in Bankruptcy in September, 1937, brought this action at law in the Supreme

Court of the State of New York, Nassau County, to recover $13,500 on a simple complaint for money had and received to the use of his bankrupt.

A bill of particulars was demanded (R. 9) and filed (R. 11).

A motion to dismiss the complaint on the ground that it did not state a cause of action was granted (170 Misc. [N. Y.] 338) upon the theory that Shannon was *in pari delicto* with the respondent Club; but, on appeal by the petitioner, the Appellate Division, Second Department, reversed (258 App. Div. 1086) and denied the motion.

The action was tried to the Court (HOOLEY, *J.*), without a jury and the complaint was dismissed with an opinion which is unreported. It is printed at page 252 of the Record.

On appeal by the petitioner to the Appellate Division, Second Department, the judgment was affirmed without opinion (262 App. Div. 752).

The petitioner then appealed to the Court of Appeals, by permission, and the Court of Appeals affirmed the judgment, without opinion (288 N. Y. 57 [memo.]).

The petitioner moved for re-argument of the appeal in the Court of Appeals and the motion was denied, without opinion (288 N. Y. 197 [memo.]).

REASONS FOR GRANTING THE WRIT.

The decision of this case involves an important basic principle, ignored by the state courts (*Armour & Co.* v. *Ft. Morgan S. S. Co.*, 270 U. S. 253, 257), the application of which is of wide public and govern-

mental interest, and which should be authoritatively applied by this Court of final jurisdiction. Aside from the well recognized immoral aspect of commercialized gambling, its economic inroads are of such importance that a national policy to deal with it should be announced by this Court, especially at this time when the tendency to extravagance and gambling threatens to undermine the national economy.

The subject of organized race-track gambling in any aspect has never been dealt with by this Court as far as the reports disclose. The industry is gigantic, involving the transfer of billions of dollars a year, and adversely affects the economic stability of communities throughout the country which should be shielded and supported to the limit of the law.

The principle is this: that the gambling industry should bear the economic burden of absorbing the losses that naturally flow from and are incident to its own operations.

To that end, anti-gambling laws should be broadly construed and rigidly applied with the body of the general law to accomplish their intended purpose—to discourage, control, suppress and, as far as possible, extirpate commercialized gambling from the life of the nation for the protection and advancement of legitimate business and the moral health of the community.

In this case the state courts have ignored that principle; with the result that the petitioner has thereby been deprived of the protection of the law of the land and has been unjustifiably discriminated against in favor of a commercialized gambling organization actively and openly engaged in violating for selfish purposes the anti-gambling provision of the state consti-

tution and the public policy of the State; all in violation of the rights guaranteed to the petitioner and the creditors he represents by the Fourteenth Amendment to the Federal Constitution.

One of the economic evils of commercialized gambling is its unnatural incitement to crime. In this case the most substantial claim (*Marett, Receiver*) is based upon the theft of a large amount of money from a bank to satisfy in the thief the very gambling vice this respondent Club fostered and promoted on its premises by allowing bookmakers there to operate openly a business it had the statutory power to prevent.

If such thievery becomes so rampant that the profits of the gambling industry are insufficient to absorb the losses that must otherwise be borne by legitimate business, it would be manifestly unjust to permit that illegal industry to lead a charmed existence outside the law and continue to siphon off the economic life-blood of the community. If one of the two must suffer, the legitimate, productive elements of society should not be denied the full protection that the laws afford.

The Constitution, statutes, decisions and public policy of the State of New York all combine to afford such protection; but when this petitioner who represents this legitimate business victim of this illegitimate industry comes forth empty-handed from the state courts upon an admitted Record of law violation by the respondents, and an undisputed state of facts supporting his proposition of law, he has been denied the protection of the law of the land.

The State courts have by their decision established a dangerous precedent for the proposition that illegal and void contracts between common gamblers for the

promotion of gambling, may be given effect to defeat the rights of creditors in legitimate business and claims for overdue Federal taxes.

Likewise the State courts have, in this case established a precedent which will promote fraud and collusion among common gamblers to defeat the state laws permitting the recovery of lost bets from common gamblers as a means of discouraging violations of the anti-gambling laws and of protecting robbed business institutions from loss; since under this decision a gambler may make a judgment against him of no effect by entering into a secret oral contract with one who ostensibly finances him with only a small portion of his capital.

Gambling today is not merely a matter of an occasional bet between friends; it relates to the operation of great gambling promotion enterprises which employ every resource of craft and money in order to swell their profits by spreading the gambling habit and breaking down the legal safeguards against it. Organized gambling not only harms the individual and leaves a trail of bribery, corruption, ruined homes and human degradation, but it is a scourge upon the national economic life. It discourages constructive work through a blind method of distributing wealth; it is wholly unproductive to society with an enormous waste of time, energy and money; it furnishes a temptation to divert funds from normal economic channels and despoils legitimate business, and develops a type of immorality that is dangerous to the State as well as to the individual.

Commercialized race-track gambling is the greatest evil threatening the noble sport of horse racing, for

interest in the sport itself is lessened in proportion to the gambling introduced. It is universal experience that when gambling is permitted to enter into any sport, that sport is ruined—witness the decline of professional baseball when professional gamblers attempted to control it.

In the words of ex-Attorney General Charles J. Bonaparte, who testified before a Legislative Committee in Washington in 1917:

> "According to my observations, the gambling in connection with horse-racing is not only a source of great demoralization and consequent unhappiness, crime and misery throughout the country, but it has virtually destroyed the value and utility of racing, whether as a legitimate form of sport or as a means of improving the breed of horses."

ASSIGNMENTS OF ERROR.

The errors which petitioner urges as ground for granting the writ of certiorari and for reversing the judgment of the State Court, are:

1. In that it neglected to enforce herein the applicable anti-gambling laws of the State of New York, particularly § 993 of the Penal Law.

2. In that it admitted, over petitioner's objection, evidence of a gambling contract creating a *chose in action* declared void by statute to rebut the legal presumption that the possessor of currency is the owner thereof.

3. In that it gave effect to a void gambling contract to defeat the petitioner's cause of action.

4. In that it dismissed the petitioner's complaint.

WHEREFORE, it is respectfully submitted that this petition should be granted.

JAMES W. ANDREWS,
As Trustee in Bankruptcy of
the Estate of Frank Shannon,
Bankrupt.

HORACE M. GRAY,
CHARLES E. WYTHE,
Counsel for Petitioner.

I hereby certify that I have examined the foregoing petition, that in my opinion it is well founded and entitled to the favorable consideration of this Court and that it is not filed for the purpose of delay.

HORACE M. GRAY,
Attorney for Petitioner.